
DATE: January 6, 1992
CASE NO. 87-ERA-27

IN THE MATTER OF

MILTON SHUSTERMAN,

COMPLAINANT,

v.

EBASCO
SERVICES,INC.,
RESPONDENT.

BEFORE: TNE SECRETARY OF LA80R

FINAL DECISION AND ORDER

Before me for review is the Recommended Decision and Order (R.D. and 0.) issued by the Administrative Law Judge (ALJ) in this case arising under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. 5851 (1988). The ALJ found that Complainant had not met his burden to establish that his discharge was discriminatory under the provisions of the ERA, and accordingly recommended that the complaint be dismissed.

I. *Background.*

Complainant, *pro se*, 1/ initiated these proceedings by filing a complaint under the ERA with the Department of Labor in which he alleged that his termination from employment on March 4,

1/ Complainant has represented himself at all stages of these proceedings, and, before me, has filed a Brief in Opposition to the ALJ's R.D. and 0. Respondent, represented by counsel below, has not filed a brief before me.

1987, was in retaliation for his refusal to falsify the

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qualifications of several unsatisfactory vendor5 supplying materials for Respondent's nuclear projects. Investigation by the Wage and Hour Division found merit to the complaint. Respondent contested this determination by requesting a hearing on the case before an administrative law judge, which was conducted from July 6-9, 1987.

The evidence 2/ in the case established that Complainant was hired by Respondent as a senior engineer on August 7, 1978, T. 65, and assumed the duties of vendor evaluation group leader in the quality assurance engineering department in September 1980, CX 7. He held this position until July 1983, when he requested reassignment to other duties. T. 224, 290, 315. While group leader, Complainant had occasion to find several vendors unsatisfactory because they were not producing materials in conformity with federal regulations governing quality assurance. T. 70, 144, 162, 174, 189, 218. Such unsatisfactory ratings prevented Respondent from purchasing needed materials from the vendors. Complainant testified that this situation created hostility between himself and management, T. 101-102, 184, 192, 241, 316, and resulted in management overriding his evaluations, either by illegally placing the vendor on a supplemental list of purchasers, T. 168-170, 174, 198, 201, 225, or by having the

2/ Complainant's Exhibits will be referred to as CX Respondent's Exhibits as RX _ , and ALJ Exhibits as ALJX References to the Hearing Transcript will be designated as T. _ .

vendor reaudited and thereafter satisfactorily rated. T. 144145, 162, 189, 225. subsequent satisfactory ratings were, however, often approved by Complainant himself. T. 152, RX 10, CX 4Gl, CX 4G.

In July 1983 Complainant requested that he no longer be required to do vendor evaluations and that he be reassigned from his position as vendor evaluation group leader. T. 224, 290, 315. Complainant testified that his reason for this request, which he communicated to his supervisor, Mr. Gibson, related to his having to approve unsatisfactory vendors because of management pressure to do so. T. 315-316. Mr. Gibson, however, testified that at the time Complainant requested reassignment, he did not mention vendor evaluation; rather, Complainant disclosed to Mr. Gibson only that he was upset at being overruled by a coworker, Al Strazza, with whom Complainant had a personality conflict. T. 462-464. Mr. Gibson reluctantly transferred Complainant within the quality assurance division to a position in which Complainant performed internal auditing but no vendor evaluations. T. 319, 597.

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During the remaining four-year period, from the July 1983 reassignment until Complainant's discharge in March 1987, Complainant worked principally out of Respondent's New York City office, where he preferred to be located, frequently doing routine clerical work, even though he was a trained engineer, T. 319, but sometimes going offsite to Respondent's client's nuclear facilities for substantive engineering work. T. 320-325

(Waterford); T. 473-476, RX 7 (South Texas). At times when he went offsite, Complainant imposed formidable conditions on the assignment before he would accept it (Colorado). T. 473-476, 597-600; CX 17; RX 7. On several occasions Complainant flatly refused offsite assignments, T. 325-326 (California), one of which (Comanche Peak), had he accepted and been **selected**, **would** have guaranteed him a job and avoided his discharge. T. 389, 477-478; RX 8; CX lC21.

Complainant testified that his discharge in March 1987 was in retaliation for his disqualification of and refusal to qualify unsatisfactory vendors during the period he performed the duties of vendor evaluation group leader from September 1980 to July 1983. T. 677-681. Despite the four-year hiatus between his asserted protected activity and discharge, Complainant contended that a conspiracy among management officials to retaliate for his vendor evaluation activity persisted throughout the period. Id. Respondent, through Complainant's supervisor, Brian Gibson, testified that Complainant was discharged with three other employees because of a reduction in force (RIF) occasioned principally by a general slowdown in the nuclear industry, T. 421, which hit the vendor evaluation function particularly hard. That division had nuclear application only and could not easily obtain other non-nuclear independent contracts as other divisions could. T. 422. Because the vendor evaluation group had many people not working on billable contracts, whose time had to be charged to overhead, the group's overhead budget was

"overrun," T. 423, requiring a staff reduction in force of twenty percent. To implement the RIF on behalf of management, Mr. Gibson created specific criteria to evaluate the retention worth of each of his nineteen employees, RX 1, T. 426. He wrote narrative evaluations under the criteria for each employee, RX 4, and he numerically ranked each employee under the evaluation given. RX 2, T. 426-434. The four employees ranked lowest, which included Complainant, were discharged. 3/ When notified by Mr. Gibson of the discharge action, Complainant did not question the reasons for the layoff, T. 381, but disclosed to his supervisor that he had a serious medical condition (neuropathy) which he

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felt ought to prevent his discharge. T. 374-380, 482483.

II. *Discussion*.

A. Under the whistleblower provision of the ERA, an employee alleging retaliatory discharge can make out a prima facie case by showing ~1) that the employee engaged in conduct protected by the ERA; (2) that the employer was aware of that conduct and took some adverse action against the employee; and (3) that the inference is raised that the protected activity was the likely reason for the adverse action. *Dartey v. Zack Co.*,

3/ Complainant also implied that he was discharged because he was only five months shy of vesting in the company pension plan. T. 379. Complainant was employed for 8 years and 7 months, from August 1978 to March 1984. Respondent contended that vesting occurs only at the tenth-year anniversary date, not at nine years, and while twelve-month leaves of absence had been allowed to provide vesting benefits for employees, no exception to the twelve-month rule had been made. Letter of April 27, 1987, of Christopher Luis, Esq., to Employment Standards Administration.

Case No. 80-ERA-2, Sec. Order, Apr. 25, 1983, slip op. at 7-8; *accord McCuistion v. Tennessee Vallev Authoritv*, 89-ERA-6, Sec. Dec. and Order, Nov. 13, 1991, slip op. at 6. Respondent may rebut this showing by establishing that the adverse action was motivated by legitimate, nondiscriminatory reasons. Respondent, however, bears only a burden of production of the rebuttal evidence; the ultimate burden of persuasion of the existence of retaliatory discrimination rests with the Complainant. Once Respondent satisfies its burden of production, Complainant then may establish that Respondent's proffered reason is not the true reason, either by showing that it is not worthy of belief or by showing that a discriminatory reason more likely motivated Respondent. *Dartey*, slip op. at 8.

In the present case, the ALJ concluded that Complainant had not met his ultimate burden to establish the existence of a retaliatory discharge. R.D. and 0. at 5. In reaching this conclusion, the ALJ determined that the evidence did not establish the element of the prima facie case that Complainant's protected activity was a motivating factor in his discharge. R.D. and 0. at 4. The evidence which the ALJ cited in support of this failure included Respondents's direct evidence of legitimate, nondiscriminatory reasons for its adverse action, evidence which normally is addressed only in the rebuttal stage of the case after the prima facie case has been established. *Dartey,* slip op.

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at 8. I recognize that the evidence in a particular case, such as the one before me, may not always be so

"finely tuned and carefully orchestrated" as to fit neatly within the analytical rules set forth in *Dartey*. *Dartey*, slip op. at 9.

Upon review of the record in this case, I fully agree with ALJ's ultimate determination that Complainant did not meet his burden of establishing that his discharge was discriminatory under the ERA. In reaching this conclusion, moreover, I specifically find that Complainant did not make out a prima facie case of retaliatory discharge, as his evidence failed to raise the inference that his protected activity was the likely reason for his discharge. Further, even assuming that a prima facie case had been established, Respondent showed by a preponderance of the evidence that its reasons for terminating Complainant were legitimate and nondiscriminatory, and these reasons were not shown by Complainant to be pretextual or unworthy of belief.~ As discussed *infra*, I have adopted the credibility determinations of the ALJ, to which special deference should be given where, as here, those determinations are rational and within the sound discretion of the factfinder. *See Pogue v. United States Dept. of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991).

B. Preliminarily, there is no question that Complainant engaged in protected activity when, purportedly against Respondent's wishes, he disqualified, or refused to requalify,

4/ Because Complainant has at all times contended that Respondent's motives were wholly retaliatory, and Respondent contended that its motives were wholly legitimate, I have employed the "pretext" legal discrimination model in the analysis of this case. *See McCuisition*, slip op. at 2 n.1. It is therefore unnecessary to employ a dual motivation standard. *Id*.

vendors not adhering to federal regulations governing quality assurance. *See* 10 C.F.R. Part 50 (1990). That Complainant did not report these matters to the Nuclear Regulatory Commission (NRC) or ~o any other government authority is irrelevant, so long as he communicated his concerns, as was done here, internally to the employer. *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1510-1513 (lOth Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. University Nuclear Systems. Inc.*, 735 F.2d 1159, 1162-1163 (9th Cir. 1984); *Consolidated Edison Co. of*

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New York v. Donovan, 673 F.2d 61, 63 (2d Cir. 1982). Moreover, it is further evident that Respondent was aware of Complainant's protected conduct and that in 1987, it took adverse action against him.

The remaining element in Complainant's prima facie case, connecting the protected activity to the adverse action, was severely and perhaps irreparably undercut by the long period that elapsed between Complainant's protected activity and his discharge. The record shows that Complainant's protected activity occurred only while he was group leader for vendor evaluations from September 1980 to July 1983. CX 7; T. 224-225, 290, 315. Yet his termination from employment occurred in March 1987, nearly four years after his reassignment from group leader to internal auditing. Where an adverse action closely follows protected activity, the inference of causation may be sufficiently established. *See*, *e.g.*, *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *Mitchell v. Baldridqe*, 759 F.2d 80, 86 (D.C. Cir. 1985). Conversely, where a significant period of time elapses between the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Burrus v. United Telephone Co. of Kansas. Inc.,* 683 F.2d 339, 343 110th Cir.), *cert denied*, 459 U.S. 1071 (1982) (three-year time interval established absence of causation). In the present case, I conclude that the four-year interval, without credible evidence to the contrary, establishes the absence of any causal connection between Complainant's vendor evaluation activity and his discharge.

Complainant's evidence on the causation element was largely circumstantial and speculative. While Complainant alleged that there was a conspiracy among management officials Mazo, Williams, and Gibson to retaliate against him based on his vendor evaluation activity from 1980 to 1983, T. 680, he could point to no concrete evidence that Respondent's alleged dissatisfaction with Complainant resulted in any adverse action. Id. For example, Complainant conceded that management officials never actually told him to change any of his reports, although Complainant believed that he was being pressured implicitly to do so. T. 101-102. His reassignment from group leader to internal auditing in July 1983 was not initiated by Respondent as a retaliatory action. Rather, it was Complainant who voluntarily resigned his vendor evaluation duties and requested reassignment, which Respondent accommodated.

During the period from July 1983 until his discharge,

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Complainant contended that he was given a great deal of clerical work, T. 318-319, though the evidence in the case credibly showed that there was little quality assurance contract work available at this time. T. 421-424. Complainant's contention that his refusal to accept a vendor evaluation assignment in California in 1984, T. 325-327, resulted in a less than satisfactory performance appraisal ignores the unrefuted fact that only Complainant's 1987 performance appraisal was considered in the retention criteria underlying Respondent's determination to discharge. RX 1, RX 2, RX 4; T. 433.

When Respondent notified Complainant of his discharge, he failed to make any mention to management of a possibly unlawful discrimination underlying the RIF. T. 372-379. Complainant instead discussed only his poor physical condition, which he apparently felt should alter Respondent's decision. T. 378-380. Moreover, Complainant failed to present any evidence regarding Respondent's motive for discharging three other employees under the same RIF, or to otherwise question the propriety of those layoffs. On these facts, considered in light of the four-year hiatus between the protected activity and discharge, I agree with the ALJ that it is not believable, and Complainant did not establish, that Respondent waited silently and conspiratorially during this long period for an opportunity to retaliate against Complainant. Accordingly, I find that the inference that protected activity was the likely reason for Complainant's discharge was not raised.

C. Even were I to assume, *arguendo*, that Complainant made a prima facie case, I find that the record evidence convincingly establishes that Respondent's reasons for the adverse action were legitimate and were applied in a nondiscriminatory fashion. *Dartey*, slip op. at 8. It was wholly within the ALJ's discretion to find credible the testimony of Complainant's supervisor, Mr. Gibson, whose demeanor the ALJ observed at the hearing, and I will not upset that determination. ALJ R.D. and O. at 4. *See Pogue,* 940 F.2d at 1289. Witness Gibson credibly testified that the RIF was occasioned by lack of billable contract work in the quality assurance division due to a general slowdown in the nuclear industry. T. 421. Employees not working on contract work accordingly overran the group's overhead, creating a financial drain on Respondent not otherwise recoupable. T. 423. Since additional billable work could not be found, a twenty percent reduction in force became necessary, and four of the quality assurance group's

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nineteen employees were required to be RIFed. T. 425.

The manner in which the RIF was conducted was shown to be nondiscriminatory through the credible testimony of witness Gibson. A total of four employees, including Complainant, were

RIFed. No suggestion was made that the other three employees were also targets of retaliation or that their selection for discharge was in any way improper. Any implication that these employees were sacrificed in a retaliatory conspiracy aimed solely at Complainant is simply not credible. While Complainant

strenuously objected to the ratings he **was given under the** criteria Mr. Gibson formulated, T. 608-619, the ALJ found, and I agree, that the ratings given were reasonable. T. 426-441. In particular, Complainant's low flexibility rating was significantly influenced by his refusal to accept offsite contract assignments. RX 4; T. 452. *See also* RX 6; T. 469-470.

Complainant's discharge was shown to be a result of employer's business judgment of specific employment retention factors unrelated to any protected activity concerning vendor evaluations performed by Complainant from 1980-1983. While Complainant contended that Respondent's entire RIF procedure was a pretext and a sham, T. 685, a preponderance of the evidence -including Gibson's credible testimony; the criteria formulated, RX 1; the narrative evaluations, RX 4; the rankings, RX 2; and the conduct of management officials surrounding the RIF, T. 438441 -- shows otherwise. On this record, I conclude that the evidence showed that Complainant's termination was motivated by legitimate business reasons, nondiscriminatorily applied, which Complainant did not show were pretextual or unworthy of credence.

Complainant's contrary arguments before me must be rejected. Complainant contends that the April 27, 1987, letter at p.4, to the Wage and Hour Division from a management official of Ebasco affirmatively established that Complainant was RIFed for refusing to do vendor evaluations. Complainant is incorrect. The ALJ could, *sua sponte,* and, as in this case, with Complainant's consent, T. 554, inquire into the relevance of the statement in that letter that Complainant was rated low on flexibility and marketability due in part to his refusing to do vendor evaluations. *See* 29 C.F.R. 5 18.401, 18.402 (1991~. The witness guestioned about the letter's statement was the supervisor who actually determined the ratings. Moreover, the hearing before the ALJ is *de novo*, *Smith v. Tennessee Valley Authoritv,* Case No. 87-ERA-20, Sec. Order, Apr. 27, 1990, slip op. at 4 n.2, and thus a document prepared by Respondent in response to investigative proceedings before

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the Wage and Hour Administrator is not dispositive. Witness Gibson's repudiation of the letter's statement is both relevant and admissible in the manner provided by the ALJ. ~

Complainant's contention that the ALJ's failure to contact the NRC by letter to determine the validity of a list (CX 6) of unsuitable suppliers unfairly prejudiced his case must be rejected. The list was relevant only to further establish the existence of protected activity, but confirmation of the

5/ Complainant's allegation that the ALJ's *sua sponte* inquiry into the relevance of the April 27 letter unfairly put the ALJ in the role of Respondent's advocate, Complainant's Opposition Brief at 4, is not well taken. Preliminarily, Complainant explicitly consented to the ALJ's request to the parties that he be allowed to question witness Gibson. T. 554. The ALJ's questioning reveals simply his intention to understand the precise bases underlying the RIF and

to complete the record on that issue.

Further, Complainant's unfairness allegation on this isolated incident completely ignores that fact that throughout the hearing, the ALJ showed sensitivity and concern regarding Complainant's *Pro se* status. The ALJ enabled Complainant to develop his case by asking the very questions of Complainant-as-witness that elicited his case in chief, and by trying to elicit evidence tending to establish the elements of causation and other issues helpful to Complainant's case.

suppliers' unsuitability had no relevance to the missing element in Complainant's case, *i.e.* showing that his vendor evaluation activity from 1980-1983 was the likely reason for his March 1987 discharge.

Complainant further contends that the testimony of witness Gibson as to the economic reasons for the RIF is not worthy of belief because immediately after the ALJ's decision was issued, Respondent published help wanted advertisements for quality assurance positions. 6/ Upon review of the record I conclude that these advertisements do not alter the substance of Mr. Gibson's testimony and other record evidence that a twenty percent reduction in force was found to be necessary in January 1987 because of overrun overhead. T. 424. Moreover, the inference that these advertisements were for jobs in precisely the division where Complainant was employed is speculative.

Complainant next argues that the ALJ's credibility determinations are flawed since no witness testified for Respondent in rebuttal of Complainant's allegation of falsified qualifications of suppliers. This argument again fails to

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recognize that the element of the prima facie case which Complainant failed to establish was not whether he engaged in protected activity, but whether he raised the inference that his protected activity was the likely reason for the adverse action. *Dartey v. Zack Co.*, slip op. at 8. Thus, Respondent's trial

6/ I note that these newspaper advertisements were not a part of the record before the ALJ, but are appended to Complainant's brief on review before me.

decision not to rebut the falsified qualifications allegations may concede the protected activity element, but does not affect Complainant's further burden to establish that his protected activity likely caused his discharge.

Complainant's remaining arguments question the ALJ's determination to credit the testimony of witness Gibson over other evidence in the case which Complainant alleges tends to show that Respondent was motivated by Complainant's 1983 refusal to do vendor evaluations. I have determined that the ALJ's credibility determinations were rational and within his discretion and they shall be upheld on review.

III. *Conclusion and Order*

For all of the foregoing reasons, I find that Complainant failed to establish a prima facie case of retaliatory discharge, and even if he had, I conclude that Respondent showed by a preponderance of the evidence that its reasons for terminating Complainant were legitimate and nondiscriminatory and were not shown to be pretextual or unworthy of belief. Accordingly, I accept the ALJ's recommendation that the complaint be, and it hereby is, DISMISSlED.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.